RECORD AND BRIEFS

No. 15-214

FILED SEP 17

IN THE

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN

BRIEF OF *AMICI CURIAE* CALIFORNIA CATTLEMEN'S ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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September 17, 2015

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae, the California Cattlemen's Association, the National Federation of Independent Business Small Business Legal Center, and the National Association of Home Builders submit this brief in support of petitioners Joseph P. Murr, et al. ("Petitioners") and respectfully request that the Petition for Certiorari ("Petition") be granted.

The California Cattlemen's Association ("CCA") is the preeminent organization of cattle grazers in California, and acting in conjunction with its affiliated local organizations, it endeavors to promote and defend the interests of the livestock industry. Formed in 1917 as a non-profit trade association, the CCA promotes the interests of ranchers both large and small in California. The CCA has 35 local cattlemen's association affiliates that serve as a strong link between the grassroots membership and the association. The CCA represents its members' interests before the California State Legislature, Congress and federal and state regulatory agencies on a wide range of issues including federal lands grazing fees and regulation, wetlands, conservation programs, air quality, wildlife

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1. No counsel for a party authorized this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Counsel of record for all parties received timely notice of *amici curiae*'s intention to file this brief pursuant to Supreme Court Rule 37.2(a). The parties have consented to the filing of this brief.

management, parcel fees, and other issues affecting the use and ownership of California's rangelands.

California is the third largest state in the union with almost 105 million acres of property. At 57 million acres, primary rangelands—meaning those lands suitable for the grazing of livestock—make up nearly 57% of California. CAL. DEP'T OF FORESTRY & FIRE PROT., CALIFORNIA'S FORESTS AND RANGELANDS: 2010 ASSESSMENT 53 (2010). Forty-three percent of these 57 million acres are in private ownership. CAL. DEP'T OF FORESTRY & FIRE PROT., CALIFORNIA'S FORESTS AND RANGELANDS: 2003 ASSESSMENT 67 (2003). Such private rangelands are found in every major geographic area of the State, with substantial ownerships along the California coast and in the Sierra foothills. *Id.* A map created by the California Department of Forestry and Fire indicates that at least 55 of California's 58 counties have private rangelands. While such rangelands account for a significant portion of California's area, they are not evenly distributed across the state. Much of the private rangeland is located in coastal regions subject to some of the state's most onerous planning and land use laws, including, of course, the California Coastal Act.

Owners of private rangeland are required to navigate the land use laws applicable to ranches that often consist of large-scale acreages sometimes stretching across multiple jurisdictions.[2] These rangelands are typically held for the purposes of a family business and have been in the

2. For example, the Bar One Ranch located in both Sierra and Plumas Counties totals 13,000 acres, the Nelson Ranch located in both Mariposa and Merced Counties totals 3,861 acres, and Roney Land and Cattle located in Butte, Tehama, Plumas, and Lassen Counties totals over 50,000 acres of private lands.

same family-operation for four or five generations. Shasta Ferranto *et al.*, *Forest and Rangeland Owners Value Land for Natural Amenities and As Financial Investment*, 65 CAL. AG. 184 (2011); STEPHANIE LARSON-PRAPLAN, CAL. RANGELANDS RESEARCH & INFO. CTR., HISTORY OF RANGELAND MANAGEMENT (2015).[3] For many ranches, the parcels have been acquired piecemeal over decades. LARSON-PRAPLAN, CAL. RANGELANDS RESEARCH & INFO. CTR., HISTORY OF RANGELAND MANAGEMENT (2015). While there may be common ownership among these parcels, the individual holdings have been acquired separately and are often noncontiguous. Particularly in mountain areas, a rancher's deeded land may be interspersed with other leased lands; loss of one key parcel may affect the operational functionality of a large area. Inconsistency in land use law and the "takings" doctrine, especially the "parcel as a whole" question, creates a minefield for these private landowners as well as uncertainty for local land use regulators when faced with such large property holdings.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing 325,000 member businesses in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses, including their rights with respect to ownership and operation of real estate. The National Federation of Independent Business, Small Business Legal Center ("NFIB SBLC") is a nonprofit,

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3. Online at http://californiarangeland.ucdavis.edu/History_of_Range_Management/.

public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The National Association of Home Builders ("NAHB") represents more than 140,000 members in 800 state and local associations. Since its founding in the early 1940s, NAHB has served as an important voice of America's housing industry. NAHB works to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing. Achieving that goal is increasingly difficult in today's contentious and unsettled legal environment. NAHB champions laws and regulations designed to preserve the value of the nation's housing stock, decrease the cost of rental housing, and facilitate economic recovery.

To fulfill their roles as the voices for small business and home builders, NFIB SBLC and NAHB frequently file amicus briefs in cases that will impact small businesses and housing. NFIB SBLC supports the Petition in this case because the "parcel as a whole doctrine" is of central concern in regulatory takings cases. The issue is of great practical concern for small business owners who happen to own one or more contiguous properties. When economic uses are severely restricted or prohibited with regard to one of those parcels, NFIB SBLC believes it is unfair to the landowner to view his or her separate legal parcels as a single economic unit for purpose the regulatory takings doctrine.

Similarly, NAHB supports the Petition in order to preserve the integrity of legally subdivided parcels which

are the cornerstone of the nation's real property system. NAHB's members are directly affected by the application of the "parcel as a whole" question. NAHB's members are property owners who engage in land development and construction activities that often occur at different times and in different phases. The viability of each of these phases is often determined by government regulation and economic conditions. It is not unusual for a developer to retain an interest in an individual parcel long after completing an adjacent development phase. Unfortunately, NAHB's members often face scenarios strikingly similar to those faced here—where parcels of separately deeded land are combined together for purposes of takings analysis. NAHB believes its homebuilder members would be greatly served if this Court grants the Petition and provides definitive guidance for land use agencies as to the "parcel as whole" doctrine.

SUMMARY OF ARGUMENT

The "parcel as a whole" concept is an important, but unresolved issue of takings law that should be defined in the context of adjoining parcels under single ownership. The CCA, NFIB and NAHB concur with Petitioners that determination of the relevant parcel of land subject to regulatory takings analysis should be clarified in order for agencies and courts to legally and equitably determine the extent of economic impact occasioned by restrictive land use regulation. The facts presented by this case, involving adjoining but legally separate parcels of property, provide the Court with the opportunity to address the issue in a context of great interest to California ranchers who may own large acreages acquired at different times and comprised of multiple legal parcels, as well as small

business owners and residential developers that acquire multiple parcels for their business operations, development activities, or investment plans.

ARGUMENT

I. THE WISCONSIN COURT OF APPEALS' DECISION ILLUSTRATES AN UNRESOLVED ISSUE IN FIFTH AMENDMENT TAKINGS LAW WHICH WARRANTS REVIEW.

The ruling below that two discrete lots, which are contiguous and happen to be owned by the same people, are subject to this Court's "parcel as a whole" doctrine from *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130–31 (1978) illustrates an overly subjective, and potentially flawed, assessment of the "relevant parcel" for regulatory takings analysis. *See Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837 (Wis. Ct. App. 2011). But this determination results from no real fault by the Wisconsin Appellate Court. Rather it derives from conflicting and piecemeal judicial decisions ostensibly offering direction on how to define the denominator in the takings equation. This case provides an opportunity for the Court to resolve long-standing questions about the "relevant parcel" for takings analysis, at least in the case of contiguous owned properties.

Determination of the relevant parcel is a critical issue that controls the outcome of many takings claims. *See* Brief for Petitioners 11. This point has been acknowledged by many courts, including this one, as noted in the Petition. *Id.* at 11–12 (citations omitted). What constitutes the relevant parcel has often perplexed the U.S. Court

of Appeals. Explaining the "question" of the relevant parcel, the First Circuit states that "it is referred to as the denominator problem because, in comparing the value that has been taken from the property by the imposition with the value that remains in the property, 'one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.'" *Palm Beach Isle Assocs. v. United States*, 208 F.3d 1374, 1380 n.4 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000) (quoting *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 48 U.S. 470, 497 (1987)).

As noted by Professor Eagle of George Mason School of Law, the circuit courts have adhered to a flexible, but factually nuanced, approach to defining the relevant parcel, *see, e.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994), but that flexibility comes at a steep price to land use agencies, property owners and the courts. Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as the Whole*, 36 VT. L. REV. 549, 551 (2012). "Repeated admonitions to use the 'parcel as the whole,' however, do little to define the contours of that whole parcel in any particular case." *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 456 (Mass. 2006).

This flexible analysis is governed by parameters which ostensibly spring from *Penn Central*'s multi-factor approach to takings analysis. The Court of Federal Claims summarized those factors applicable to the relevant parcel as the following:

> (1) the degree of contiguity between property interests, (2) the dates of acquisition of property

> interests, (3) the extent to which a parcel has been treated as a single income-producing unit, (4) the extent to which a common development scheme applied to the parcel, and (5) the extent to which the regulated lands enhance the value of the remaining lands.
>
> The court also stated that a sixth factor, 'the extent [to which] any earlier development had reached completion and closure' was also relevant to consideration in the relevant-parcel analysis.

Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as the Whole*, 36 VT. L. REV. 549, 569 (citing *Lost Tree Village Corp. v. United States*, 100 Fed Cl. 412, 428 (2011) (citing *Palm Beach Isles Assocs. v. United States*, 208 F.3d at 1381; *Lost Tree Village Corp. v. United States*, 92 Fed Cl. 711, 718 (2010))) (brackets in original). But while many cases have considered these factors, the inherent vagaries of flexibility and factual nuance frequently lead to conflict and confusion in the outcome. Courts are not required to accord the same weight or consideration to any respective factor. As such, disparate results arise that tend to cast doubt on the integrity of Fifth Amendment jurisprudence and lead to questions of the transparency of court decisions. As surmised by Professor Eagle,

> The idea that the rule under which one evaluates the facts is not a fixed one, but varies with the facts themselves, is apiece with the "ad-hockery" that makes it so difficult for lawyers to predict with any confidence what *Penn Central* means.

Id. at 566–567 (citing Susan Rose-Ackerman, *Against Ad Hockery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988) (noting the confusion caused by ad hoc factual inquiries in the current takings jurisprudence); Gideon Kramer, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 687 (2005)).

The *Murr* case provides a simple fact pattern which may lend itself to a multi-factor determination. But that simple factual context also provides this Court the opportunity to provide practical objective guidance on the appropriate weighting of those factors. As explained by Petitioners, the *Murr* facts lack the complexities of many regulatory takings cases which are confounded by such things a temporal considerations, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), geophysical factors, *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 48 U.S. 470, 497 (1987), or eagle feathers *Andrus v. Allard*, 444 U.S. 51 (1979). Instead, this matter is simply a question of the regulation of two distinct parcels of residential property which are owned by one party and happen to be contiguous.

II. COURTS ARE IN CONFLICT ON APPLICATION OF THE "PARCEL AS A WHOLE" CONCEPT.

As illustrated in the Petition, inconsistent and contradictory approaches have been used by federal and state courts on the aggregation of parcels for Fifth Amendment takings analysis. *See* Brief for Petitioners 17–21. A number of the key federal cases in the area of takings

law have grown out of disputes arising in California.[4] This disparity of process and result illustrates that not only do property owners need clarity on the application of the "parcel of a whole" doctrine, but regulators and the courts do as well.

The CCA's members own and manage property in 55 of California's 58 counties. NFIB and NAHB's members own property in essentially every county in California and many other states as well. This means that California's ranchers, small business owners and home builders—all of whom may be directly affected by the "parcel as a whole" doctrine in current and future use of their properties—are regulated by no fewer than 55 different counties and a significantly greater number of cities in which such properties may lie. In addition to county and city jurisdictions, many California ranchers, business owners, and residential developers are subject to regulation by the California Coastal Commission ("Coastal Commission") for properties located in the coastal zone. As this Court knows, this state agency has regulatory authority over

4. Like many states, the California Constitution contains a "takings clause" that closely parallels the Fifth Amendment to the U.S. Constitution 's provision that "[N]or shall private property be taken for public use, without just compensation." Article I, Section 19 of the California Constitution provides in part: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to, or into court for, the owner." Despite a slight disparity in wording, California regulatory taking cases treat the state and federal takings provisions as essentially identical. As a result, in reviewing regulatory takings challenges under California's Constitution, California courts frequently rely upon U.S. Supreme Court decisions. *See, e.g., Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 858 (Cal. 1997); *San Remo Hotel v. City & Cty. of San Francisco*, 41 P.3d 87, 100–101 (Cal. 2002).

large swathes of privately owned lands, including some extensive rangelands, in Southern, Central and Northern California.

In the absence of judicially-directed consistency on this critical issue, property owners of contiguous properties may be subject to conflicting land use regulation from multiple agencies over a widely dispersed properties, or even be subject to conflicting regulatory interpretation on immediately contiguous parcels from different agencies. This potential disparity works not only to the detriment of the property owner, but also the land use agencies themselves who have no ability to act in concert in their interpretation of the parcel as a whole doctrine.

This disparity has not gone unnoticed by the courts. Just as inconsistency is illustrated in federal and state cases in Petitioner's Brief, California also presents examples of conflicting determinations. For example, in *Twain Harte Associates, Ltd. v. County of Tuolumne*, 265 Cal. Rptr. 737, 745–747 (Ct. App. 1990), the court found that two contiguous properties with common ownership would *not* be treated as a whole parcel for purposes of a takings analysis because of a zoning distinction. The court reached a similar conclusion in *Jefferson Street Ventures, LLC v. City of Indio*, 187 Cal. Rptr. 3d 155 (Ct. App. 2015) as well as *Aptos Seascape Corp. v. County of Santa Cruz*, 188 Cal. Rptr. 191 (Ct. App. 1982).

However, a California Appellate Court distinguished these earlier cases (*Harte* and *Aptos*) based upon the zoning distinctions and applied the parcel as a whole rule in *Ramona Convent of the Holy Names v. City of Alhambra*, 26 Cal. Rptr. 2d 140 (App. Ct. 1993). In that case the court

ruled in a regulatory takings dispute that the entire parcel of a school—19.17-acres—was the denominator in the takings equation, rather than the 1.97-acre parcel carved out for sale as a fundraiser. By further contrast, in *Kalway v. City of Berkeley*, 60 Cal. Rptr. 3d 477 (App. Ct. 2007), the court looked through a spousal property transfer to determine that common ownership still existed and the "parcel as a whole" doctrine applied. Another court has found that the "whole parcel" is determined by looking at "(1) unity of title; (2) contiguity of the parcels; and (3) unity of use." *San Diego v. Neumann*, 863 P.2d 725, 730 (Cal. 1993). On its face the factors posed in *Neumann* pay lip service to elements of *Lost Tree Village Corp.*, but the court is clearly weighting "unity" as a key factor without justification or consideration of *Penn Central*'s key consideration of the "investment-backed expectations" of the property owner. *Penn Central*, 438 U.S. at 124.

State agencies such as the Coastal Commission are charged with furthering specific statutory tasks and goals for which they were created, but the takings doctrine must serve as a critical check on the agency's pursuit of those goals. While the Coastal Commission is authorized to "liberally" pursue its environmental mandate, at the same time the Coastal Act recognizes that the Commission is not authorized "to grant or deny a [coastal development] permit in a matter which will take or damage private property for public use, without payment of just compensation therefor." Cal. Pub. Res. Code § 30010.

Despite this restraint, the Coastal Commission recently advocated an expansive interpretation of the "parcel as a whole doctrine" to justify a limitation on real

property development. The "unity of ownership" theory was asserted in a California Coastal Commission Staff Report as grounds for the Coastal Commission's denial of development applications for five separate single-family residences in the Santa Monica Mountains above Malibu, California. CAL. COASTAL COMM'N, STAFF REPORT: REGULAR CALENDAR 82 (2010).[5] Despite evidence to the contrary, and without citation to supporting evidence, the Commission Staff Report disputed that the five parcels were separately owned, and asserted that the history and ownership structure of the parcels, and coordination in their development, provided evidence that "all of the parcels are actually owned" by a single person, *id.* at 80, which justified denying the development permits. S. CENT. COAST STAFF, CAL. COASTAL COMM'N, AGENDA ITEMS 13C-H (2011).[6]

This is but one example where this Court's resolution of the contiguous property "parcel as a whole" issue would assist in limiting confusion and overreaching conduct by government regulators.

III. CLARITY ON THE IMPORTANCE OF PROPERTY RIGHTS IS NEEDED

Granting the Petition allows the Court the opportunity to address a fundamental question of the overlap between real property law and land use regulation. As discussed above, the multi-factor approach to determining the

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5. Online at http://documents.coastal.ca.gov/reports/2011/2/Th8a-s-2-2011.pdf.

6. Online at http://www.coastal.ca.gov/meetings/mtg-mm11-6.html.

relevant parcel lacks objective standards to ensure uniformity in regulatory takings cases. This lack of objectivity has resulted in lower courts struggling to accurately define the relevant parcel. But this struggle further illustrates a more fundamental question regarding how to balance underlying property rights against the factors developed by the courts to either shrink or enlarge the property subject to the takings analysis. As noted by Professor Eagle,

> While courts have determined the relevant parcel to be larger or smaller, the baseline for 'parcel as a whole' remains the deeded parcel. Each legal parcel is a separate parcel for takings analysis, unless and until the facts indicate otherwise. 'To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, *the parcel in question.*'

See Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as the Whole*, 36 VT. L. REV. 549, 562 (2012) (citing *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993)) (emphasis added and citations omitted). In deference to legal rights conveyed with a legally subdivided parcel of property, Professor Eagle and others have suggested a more neutral approach to the relevant parcel analysis, "balancing the dangers of severance and agglomeration." *Id.* at 562 (2012); STEVEN J. EAGLE, REGULATORY TAKINGS, § 7-7(e)(5) (4th ed. 2009).

To date, and with no objective or systematic basis for their conclusion, "most courts entertain at least a strong presumption that all contiguous land held by a single

owner is to be treated as a single unified parcel." John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1031 (2003) (citing, *inter alia*, *District Intown Props. Ltd. v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999)). Adopting such a "strong presumption" that disregards legally-created parcels goes to the heart of the conflict over weighting of long established property rights in the takings equation:

> It may be necessary to consider an owner's property as an undivided whole to avoid extreme results under the deprivation-of-all-use standard. To engage in such 'conceptual agglomeration' . . . however, is to violate the concept of property as a set of fungible entitlements. Large landowners are disadvantaged in their constitutional rights compared to small landowners for no apparent constitutional reason other than to find some limit to the regulatory takings doctrine.

STEVEN J. EAGLE, REGULATORY TAKINGS § 11-7(b)(2) (2d ed. 2001).

In light of these concerns about perceived subjectivity in defining the relevant parcel, the *amici* support the opportunity for the Court to consider the instant case. The Court can elucidate on the underlying deference to be shown to property rights as juxtaposed against the judicial factors utilized to define the relevant parcel.

CONCLUSION

For the foregoing reasons, *amici curiae* the California Cattlemen's Association, the National Federation of Independent Business Small Business Legal Center, and the National Association of Home Builders respectfully submit the Petition should be granted.

Respectfully submitted,

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September 17, 2015